88-1391

Supreme Court, U.S.
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No. _____

In The
Supreme Court Of The United States

OCTOBER TERM, 1988

JAMES AVIS,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT WITH APPENDIX

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QUESTIONS PRESENTED

1. Whether the trial court's failure to define the term "passive acquiescence," as used in the accessory liability statute under which the petitioner was prosecuted for felony murder, constituted a denial of due process, where both a juror and petitioner's counsel requested such a definition in the supplemental charge, and where the Connecticut Supreme Court found error, but refused to reverse because the defendant did not show that the error was probably harmful?

2 Whether the Connecticut Supreme Court applied the proper standard of review on the "passive acquiescence" issue, as the error implicated the defendant's constitutional rights, and the burden of showing harm should have been placed on the state?

3 Whether the Connecticut Supreme Court erred in its conclusion that the trial court's decision to submit the original indictment of the petitioner to the jury along with the substitute information constituted harmless error, where original indictment alleged that the petitioner killed the victim, the information alleged that a co-participant alone killed the victim, and where there was evidence presented at trial supporting the allegation that the petitioner killed the victim?

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INTRODUCTORY PRAYER

The petitioner, James Avis, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Connecticut, entered in the above-entitled proceeding on December 6, 1988. (Reargument denied December 20, 1988).

OPINION BELOW

The opinion of the Supreme Court of Connecticut was entered on December 6, 1988 and is reported at 209 Conn. 290, ____ A.2d ____ (1988), and is reprinted in the Appendix hereto. (Appendix to Petition, p. 1a–21a).

The Connecticut Supreme Court's order denying the motion for reargument is not reported. The order is reprinted in the Appendix hereto. (Appendix to Petition, p. 28a).

JURISDICTION

The judgment of the Connecticut Supreme Court was entered on December 6, 1988, affirming the trial court's judgment on a jury verdict against the petitioner on the charge of felony murder which was returned on October 14, 1986. The Connecticut Supreme Court denied a timely motion for reargument on December 20, 1988, and this petition for a writ of certiorari is being filed within 60 days of that date.

The jurisdiction of this court to review the judgment of the Connecticut Supreme Court is invoked under 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION, AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

UNITED STATES CONSTITUTION, AMENDMENT XIV, SECTION 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

CONNECTICUT GENERAL STATUTES, SECTION 53a-8 (Rev. to 1978): Criminal Liability for Acts of Another

A person acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender.

CONNECTICUT GENERAL STATUTES, SECTION 53a-54c (Rev. to 1978): Felony Murder

A person is guilty of murder when, acting either alone or with one or more persons, he commits or attempts to commit robbery, burglary, kidnapping, arson, sexual assault in the first degree, sexual assault in the first degree with a firearm, sexual assault in the third degree, sexual assault in the third degree with a firearm, escape in the first degree, or escape in the second degree and, in the course of and in furtherance of such crime or of flight therefrom, he or another participant, if any, causes the death of a person other than one of the participants, except that in any prosecution under this section, in which the defendant was not the only participant in the underlying crime, it shall be an affirmative defense that the defendant: (A) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and (B) was not armed with a deadly weapon, or any dangerous instrument; and (C) had no reasonable ground to believe that any other participant was armed with such a weapon or instrument; and (D) had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

CONNECTICUT GENERAL STATUTES, SECTION 53a-134(a) (Rev. to 1978): Robbery in the First Degree: Class B Felony

(a) A person is guilty of robbery in the first degree when, in the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime: (1) Causes serious physical injury to any person who is not a participant in the crime; or (2) is armed with a deadly weapon; or (3) uses or threatens the use of a dangerous instrument; or (4) displays or threatens the use of what he represents by his words or conduct to be a pistol, revolver, rifle, shotgun, machine gun or other firearm; except that in any prosecution under this subdivision, it is an affirmative defense that such pistol, revolver, rifle, shotgun, machine gun or other firearm was not a weapon from which a shot could be discharged. Nothing contained in this subdivision shall constitute a defense to a prosecution for, or preclude a conviction of, robbery in the second degree, robbery in the third degree or any other crime.

STATEMENT OF THE CASE

This case involves the due process and fair trial rights of the petitioner who was found guilty of felony murder following a trial to the jury.

The petitioner was initially indicted[1] and charged with the crime of felony murder in violation of Section 53a-54c of the Connecticut General Statutes on August 11, 1980, and entered a plea of not guilty and jury election on October 29, 1980. The indictment alleged that James Avis or a co-participant killed Alfred Schmid in the course of a robbery.

Prior to the petitioner's indictment, Daniel Vinal, Jr. had been charged with the murder of Schmid in violation of Section 53a-54a of the Connecticut General Statutes. Both cases were assigned for a joint jury trial in the summer of 1981. The trial court denied the petitioner's motion to sever the joint trial, the trial concluded with guilty verdicts against Avis and Vinal, and both men took appeals following sentencing. The Connecticut Supreme Court found error in the denial of the motion to sever and remanded the matters for separate trials in *State v. Avis,* 198 Conn. 644, 504 A.2d 1364 (1986).

Vinal was retried on the charges of murder and felony murder in 1986, found guilty on both counts, and was sentenced. Vinal then took an appeal to the Connecticut Supreme Court which found no error. *State v. Vinal,* 205 Conn. 507, 534 A.2d 13 (1987).

State v. Avis was assigned for trial in September, 1986. The State alleged in its substitute bill of particulars dated September 29, 1986 that James Avis was in the company of one Daniel Vinal during the evening hours of October 7, 1978

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[1] In 1978, prosecution for any offense carrying possible punishment of life imprisonment or death commenced by grand jury indictment in Connecticut. The requirement of a grand jury indictment for such prosecution was abolished in 1982.

and the morning hours of October 8, 1978; that Avis knew that Vinal was armed with a handgun; that the two, "while in the company of one another, came upon the victim, Alfred Schmid," in Litchfield, Connecticut, and robbed Schmid of his wallet; and that "in the course and in furtherance of said robbery or flight therefrom, the co-participant, Daniel Vinal, caused the death of the victim" by shooting him.

By substitute information dated October 7, 1986, the State charged Avis with felony murder and alleged that Avis, "when acting with another person, namely Daniel Vinal, committed robbery and in the course of and in furtherance of such crime or of flight therefrom the other participant, Daniel Vinal," caused Schmid's death.

The issues at trial were whether Schmid had been the victim of a robbery, and if so, whether Avis had any role in the robbery. The State's evidence which supported its contention that Avis and Vinal had robbed the victim focused primarily on a written statement signed by Avis in which Avis "confessed" to robbing and killing Schmid; stated that he took Schmid's wallet and discarded it in a brook in Litchfield; and exonerated Vinal from complicity in the incident. (State's Exhibit 55; T. Vol. 8, p. 32)[2]

The State took the position at trial that the petitioner had not shot Schmid (T. Vol. 11, pp. 29, 34) but that Vinal in fact had done so (T. Vol. 11, pp. 46, 35). In effect, the State only offered the written statement to prove that a robbery had taken place and that Avis was a participant therein. In addition, evidence was presented that a bartender had seen Avis and Vinal argue earlier on the evening of October 7, 1978, and that Vinal pulled out a gun, slid it toward Avis who in

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[2] The trial transcript in this case consisted of eleven numbered volumes and five unnumbered volumes. Throughout this petition, references to the transcript in numbered volumes are made according to volume and page. Any references in unnumbered volumes are designated by the date of the proceedings and the transcript page.

turn slid it back toward Vinal, and told Vinal, "put it away, you need this, I don't." (T. Vol. 5, pp. 104–107, 114).

The petitioner contended at trial that he was unaware of Vinal's intent to rob Schmid and that he did not participate in the robbery. Avis testified that he had been with Vinal on the night in question; that the two had an argument at a bar over who was the tougher of the two; that Vinal passed a gun to Avis after saying that Avis would need a gun to take him; and that Avis returned the gun to Vinal and told him to put it away (T. Vol. 9, pp. 43–45).

Avis also stated that he and Vinal went to the Regency Lounge at about 2:30 or 3:00 a.m. on October 8, 1978; that the two were drunk when they left; that as they departed, Vinal told Avis to follow Schmid inasmuch as Schmid had called Vinal a "homo"; that he proceeded to follow the victim who pulled his car over at a liquor store; and that Vinal told Avis, " 'I'm going to kick that guy's butt', or words similar to that." (T. Vol. 9, pp. 45–53).

The petitioner also testified that after Vinal had left the car, he fell asleep or passed out, and that he was awakened by a shove on the shoulder by Vinal who said, "Let's get the hell out of here. I just wasted that guy." (T. Vol. 9, pp. 53–54).

Avis stated that he signed the "confession" in part because Vinal's attorney (who had represented Avis on a divorce earlier in 1978) indicated that if Avis had been with Vinal on the night of the incident, Avis would be considered as guilty as Vinal and because Avis was assured that his children would be financially taken care of and the divorce debt which he owed Vinal's attorney would be forgiven if he helped Vinal (T. Vol 9, pp. 78–79). Vinal's attorney denied offering to wipe out any debts Avis still owed to him as well as promising financial support for Avis's children in exchange for Avis's cooperation (T. Vol. 10, pp. 61–62).

The evidence concluded and the court charged the jury on October 7, 1986 (T. Vol. 11, pp. 94–196). The trial court submitted the original indictment, the substitute information, and the substitute bill of particulars to the jury along with the exhibits at the commencement of deliberations. The petitioner took exception to the decision to send the original indictment to the jury along with the other two charging documents (T. Vol. 11, pp. 192–193; Appendix to Petition, pp. 37a–38a). The jury deliberated on October 8, 9, 10 and 14, 1986. During the deliberations, the jury sent out a number of questions and the court gave supplemental charges (T. 10/8–14/86, pp. 2–93).

During the deliberations, the jury requested on several occasions that the court read back the charge pertaining to the law on aiding and abetting in the context of felony murder (T. 10/8–14/86, pp. 7–12, 15–20, 22–36, 42–50, 63–67). During one of the suplemental charges, a juror asked if the court could define "passively acquiesced" as used in the portion of the charge pertaining to possible defenses to accessory liability (T. 10/8–14/86, p. 47; Appendix to Petition, p. 44a).

The court refused to define "passively acquiesced" for the jury; it continued to read the portion of its original charge pertaining to the law on aiding and abetting, and upon completion, the petitioner requested that the court provide the jury with a definition of "passive acquiescence" (T. 10/8–14/86, pp. 47–50; Appendix to Petition, pp. 44a–45a). The court again refused to do so and Avis took exception (T. 10/8–14/86, p. 50); Appendix to the Petition, pp. 45a–46a).

The jury returned a guilty verdict to the charge of felony murder on October 14, 1986. The petitioner, through counsel, inquired whether the finding of guilty which was returned against him was as a principal or as an accessory. The state objected to such inquiry being put to the jury, and the court sustained the objection (T. 10/8–14/86, p. 92; Appendix to the Petition, p. 48a). Avis took timely exception to the court's denial of his request.

The petitioner raised seven issues in his appeal to the Connecticut Supreme Court. Two of the seven issues are the bases for this petition for certiorari. Specifically, the Connecticut Supreme Court agreed with Avis's claims that the trial court erred (1) in its failure to define "passive acquiescence" and (2) in its decision to submit the original indictment, along with the substitute information, to the jury but concluded that the errors were harmless.

The Connecticut Supreme Court concluded that the jury's "multiple requests" to have the portion of the charge dealing with "passive acquiescence" read back supported Avis's contention that the refusal to define the term "might have deprived the jury of sufficient guidance in its deliberations" but that such error was harmless. *State v. Avis,* 209 Conn. 290, 306, ____ A.2d ____ (1988).

> The record indicates that the jury was ultimately satisfied with the court's responses to its inquiries. Furthermore, read as a whole, the charge adequately instructed the jury that the defendant could not be convicted pursuant to Section 53a-8 without intending to aid and aiding, in the commission of the crime. It is not probable that the jury was mislead to believe otherwise. (footnote omitted)

Id.

The Connecticut Supreme Court went on to hold that although the trial court erred in submitting the original indictment to the jury, such error was harmless. *State v. Avis, supra,* at 308.

> The court had correctly instructed the jury that the substitute bill of particulars stating that Vinal caused the victim's death was binding on the state and that the defendant was not charged with intentional murder. The court had also correctly instructed the jury that the indictment was not to be considered

> evidence. On this state of the record, the defendant was not prejudiced by the court's error and suffered no substantial injustice because of it. (citation omitted) (footnote omitted)

Id.

In his motion for reargument dated December 15, 1988, the petitioner claimed that the Connecticut Supreme Court (1) failed to apply the proper standard of review in its consideration of his claim that the trial court's refusal to define "passive acquiescence" constituted prejudicial error; and (2) mistakenly concluded that the trial court's submission of the original indictment to the jury constituted harmless error. The Connecticut Supreme Court denied the motion for reargument on December 20, 1988.

REASONS FOR GRANTING THE WRIT

A. The trial court's failure to define the term "passive acquiescence", as used in the accessory liability statute under which the petitioner was prosecuted for felony murder, was harmful error and constituted a denial of due process, where both a juror and petitioner's counsel requested such a definition in the supplemental charge.

It is axiomatic that an accused is entitled to precise and specific instructions on any theory of defense for which there is any foundation in evidence, and a charge which ignores such a defense is erroneous. *U.S. v. Miller,* 771 F.2d 1219 (9th Cir. 1985); *Perez v. U.S.,* 297 F.2d 12 (5th Cir. 1961); *Tatum v. U.S.,* 190 F.2d 612, 88 U.S. App. D.C. 386 (D.C. Cir. 1951), *affirmed* 249 F.2d 129, 101 U.S. App. D.C. 373 (D.C. Cir. 1957), *cert. den.* 356 U.S. 943, 78 S. Ct. 788, 2 L. Ed. 2d 818 (1958).

The failure to adequately instruct a jury on the elements of an offense charged or a theory of defense put forward constitutes a denial of due process as guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution. *State v. Miller,* 186 Conn. 654, 660, 443 A.2d 906 (1982). "When a proper request for an instruction on a criminal defendant's theory of defense is made, it is reversible error not to present that theory *adequately* in a full statement of the law. (citations omitted)" *U.S. v. Duncan,* 850 F.2d 1104, 1117-1118 (6th Cir. 1988). (emphasis added)

When a proper request is made, a defendant is entitled to a jury charge which "precisely and specifically rather than merely generally or abstractly, points to his theory of defense." *Perez v. U.S., supra,* at 16; *see also, U.S. v. Indiana Trailer Corp.,* 226 F.2d 595, 598 (7th Cir. 1955); *Apel v. U.S.,* 247 F.2d 277 (8th Cir. 1957). While the trial judge read the abstract principles of law relating to accessory liability to the jury in the instant case, it refused requests to provide precision and specificity by defining a legal term of critical importance to the petitioner's theory of defense.

While a court need not define a term which has a "common, readily understandable meaning," *U.S. v. Valencia*, 645 F.2d 1158 (2nd Cir. 1980) reh. *en banc* den. 669 F.2d 37 (1981), appeal following remand, 677 F.2d 191 (1982), the court must explain all terms of legal significance in its charge. *U.S. v. Lemire*, 720 F.2d 1327, 232 U.S. App. D.C. 100 (D.C. Cir. 1983), *cert. den.* 467 U.S. 1226, 104 S. Ct. 2678, 81 L. Ed. 2d 874 (1984).

The petitioner suffered harm from the trial court's refusal to define "passive acquiescence." Avis asserted in his defense that when Vinal killed Schmid, Avis was unconscious and had no prior knowledge as to what Vinal intended to do. The jurors deliberated for four days, during which they sent out numerous questions for which the court gave supplemental charges. The jury was obviously giving serious consideration to the defense raised inasmuch as the jurors requested that the court read back the charge dealing with the term "passive acquiescence", on several occasions.

B. The Connecticut Supreme Court applied an incorrect standard of review in its consideration of the petitioner's claim that the trial court erred in its refusal to define "passive acquiescence" as requested by a juror and petitioner's counsel.

A conviction will be reversed on the basis of error in instructions only if there is error and if there is a reasonable possibility that the error materially affected the verdict. *U.S. v. Argentine*, 814 F.2d 783 (1st Cir. 1987); *U.S. v. Herbert*, 698 F.2d 981 (9th Cir. 1983) *cert. den.* 464 U.S. 821, 104 S. Ct. 87, 78 L. Ed. 2d 95 (1983); *U.S. v. Valle-Valdez*, 554 F.2d 911 (9th Cir. 1977); *State v. Marra*, 195 Conn. 421, 489 A.2d 350 (1985); *State v. Tatem*, 194 Conn. 594, 483 A.2d 1087 (1984).

The harmlessness of a constitutional error in a jury charge must be established by the state beyond a reasonable doubt. *Delaware v. van Arsdall*, 475 U.S. 673, 106 S. Ct. 1431, 89

L. Ed. 2d 674 (1986); *State v. Nardini*, 187 Conn. 513, 447 A.2d 396 (1982); *State v. Cosgrove*, 186 Conn. 476, 442 A.2d 1320 (1982). In the instant matter, the Connecticut Supreme Court held that although the trial court erred in refusing to define the term "passive acquiescence" as requested by a juror and petitioner's counsel, such error was harmless because it was "not probable that the jury was misled." *State v. Avis*, 209 Conn. 290, 306, ____ A.2d ____ (1988).

The petitioner has been harmed by the action of the Connecticut Supreme Court. The Supreme Court's conclusion indicated that the court required that the petitioner show probable, as opposed to possible, harm resulting from the trial judge's action. This clearly placed a substantially heavier burden on the petitioner in his appeal — a burden which the Connecticut Supreme Court concluded Avis had not satisfied.

The strength of the government's case against a defendant has a bearing on whether error is prejudicial. *Osborne v. U.S.*, 351 F.2d 111 (8th Cir. 1965). In *Osborne*, the fact that the jury deliberated for 16 hours and requested an additional exhibit and the re-reading of instructions, gave credence to the notion that the case was a close and difficult one. *Id.*

The concept of passive acquiescence went to the heart of the defense. At least one juror had difficulty in comprehending the concept. It is reasonably possible that the trial court's failure to define the term precluded the jury from properly considering the defense, and led the jury to arrive at the guilty verdict. The error very clearly was not harmless beyond a reasonable doubt.

C. The Connecticut Supreme Court erred in its conclusion that the trial court's decision to submit the original indictment of the petitioner to the jury along with the substitute information was harmless error.

A jury room must be kept free of evidence not received during trial, and its presence, if prejudicial, will vitiate a verdict. *Government of the Virgin Islands v. Joseph,* 685 F.2d 857 (3rd Cir. 1982). The sending of an indictment into the jury room is within the sound discretion of the trial judge. *U.S. v. Polowichak,* 783 F.2d 410 (4th Cir. 1986); *U.S. v. Medina,* 761 F.2d 12 (1st Cir. 1985); *U.S. v. Warner,* 428 F.2d 730 (8th Cir. 1970), *cert. den.* 400 U.S. 930, 91 S. Ct. 194, 27 L. Ed. 2d 191 (1970).

In *U.S. v. Warner, supra,* the trial court sent an indictment into the jury room which contained four counts which has been dismissed. The Court of Appeals for the Eighth Circuit held that the error in submitting such an indictment was harmless for four reasons:

(1) the judge instructed the jury that an indictment is not evidence and that four counts of the indictment had been dismissed;

(2) the dismissed counts were "virtually identical in substance and factual circumstance" to the counts not dismissed and "added little or nothing of prejudicial effect;"

(3) the two cases cited by the appellant[3] involved evidence "of a much more highly prejudicial nature;" and

(4) "the total weight of the government's evidence" was "overwhelming and essentially unrebutted."

U.S. v. Warner, supra, at 737.

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[3] *Osborne v. U.S.,* 351 F.2d 111 (8th Cir. 1965); *Karn v. U.S.,* 11 Alaska 225, 158 F.2d 568 (1st Cir. 1946).

The trial judge in the case at bar instructed the jury that the indictment was not evidence and the state had abandoned its claim that Avis had shot Schmid. Unlike the situation in *Warner,* however, the extraneous allegations in the original indictment (*i.e.,* that Avis shot Schmid) was clearly not identical to the state's theory at the time of trial that Avis was only an accomplice, and when viewed along with the "confession" in which Avis stated that he shot Schmid, was highly prejudicial.

Furthermore, unlike *Warner,* the state's evidence in the instant case was far from overwhelming. As such, a thorough and correct jury charge accompanied by accurate and specific charging documents, were essential in order for the petitioner to have received a fair trial.

In a case where several of the named defendants are not on trial and the parties changed during the course of trial, the better practice is not to submit the indictment to the jury in writing because it will only serve to confuse the jury. *U.S. v. Maselli,* 534 F.2d 1197 (6th Cir. 1976).

The submission of a bill of particulars to the jury, which submission involved potential confusion with the charges in the grand jury indictment and thus touches sensitive area of constitutional guarantee of trial only on the indictment, is undesirable. *U.S. v. Radetsky,* 535 F.2d 556 (10th Cir. 1976), *cert. den.* 429 U.S. 820, 97 S. Ct. 68, 50 L. Ed. 2d 81 (1976).

In *U.S. v. Radetsky,* the appellant claimed that submission of the bill of particulars led to confusion in the jury's comprehension of the charges set forth in the indictment whereas in the case at bar, petitioner contends that submission of the original indictment led to confusion in understanding the charges as alleged in the substitute information which superseded the indictment. Both *Radetsky* and the instant case involved material inconsistencies in charging instruments sent to the jury.

The defendant's constitutional rights to a fair trial and due process were clearly at stake when the trial court submitted the original indictment to the jury. Had there been a complete absence of any evidence supporting the allegation set forth in the indictment that Avis killed Schmid, it may be clear that the trial court's error was harmless.

However, the jury had before it the "confession" in which Avis stated that he had robbed and killed Schmid, and that Vinal had nothing to do with such actions. The jury also had the court's charge that the weight to be given to the evidence was solely within its province.

The error was clearly harmful in that the most prejudicial piece of evidence against the defendant was the "confession" in which the defendant stated he alone shot Schmid. The state abandoned this claim in its substitute bill of particulars. However, by submitting the indictment along with the evidence supporting a material allegation contained therein (that Avis shot Schmid), both pertaining to a claim no longer in issue (who shot Schmid), the trial court misled and confused the jury. The court effectively presented the jurors with an alternative theory of criminal liability, and in so doing, denied the defendant his right to a fair trial as guaranteed by the Sixth Amendment to the U.S. Constitution.

The state has failed to demonstrate beyond a reasonable doubt that said error was harmless. Furthermore, when the verdict was announced and the defendant inquired whether the finding of guilty which was returned against him was as a principal or as an accessory, the state objected to such inquiry being put to the jury, and the court sustained the objection (T. 10/8–14/86, p. 92; Appendix to Petition, pp. 48a). The defendant took timely exception to the court's denial of his request. Assuming *arguendo* that the defendant had the burden of demonstrating the harmfulness of the trial court's decision, the trial court's denial of his inquiry to the jury precluded him from establishing the harmfulness of the error.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED,

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No. _____

In The
Supreme Court Of The United States

OCTOBER TERM, 1988

JAMES AVIS,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

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STATE OF CONNECTICUT *v.* JAMES AVIS (13156)

PETERS, C. J., SHEA, CALLAHAN, GLASS and HULL, Js.

The defendant, whose conviction of the crime of felony murder, following a joint trial conducted against both him and a codefendant, V, was set aside by this court, appealed to this court from his conviction of the crime of felony murder after a new trial, which was conducted against him alone as ordered by this court. The defendant claimed, inter alia, that the trial court erred in denying his motion to suppress a written statement he had made to D, an investigator hired by the attorney for V. *Held:*

1. The trial court did not abuse its discretion in admitting the challenged statement into evidence; that court's determinations that the statement had not been obtained as a result of allegedly unethical conduct on the part of V's attorney, that it had been given voluntarily and that, although portions of it were known to be false, it was sufficiently reliable to be admitted, were not clearly erroneous.
2. The trial court did not abuse its discretion either in limiting, on relevancy grounds, the defendant's direct examination of the state's attorney and assistant state's attorney concerning their opinions of the reliability of the challenged statement, or in limiting the defendant's cross-examination of D by excluding evidence of certain allegedly inconsistent prior statements made by him, which statements that court determined were not inconsistent, nor did it err in refusing to permit the defendant to cross-examine D concerning certain alleged prior misconduct where that court could reasonably have concluded that the proffered evidence was lacking in factual support and, not being especially relevant to veracity, was more likely to be prejudicial than probative.
3. Although the trial court erred in refusing the jury's request for a supplemental instruction defining the term "passive acquiescence," as that term was used in that court's charge explaining criminal liability for the acts of another, that error was harmless because the record indicated that the jury was ultimately satisfied with the trial court's responses to its inquiries, and because the charge given, read as a whole, adequately instructed the jury that the defendant could not be convicted without a finding that he had intended to aid, and had aided in the commission of a crime; further, that court did not err in refusing to grant the defendant's request to define the term "intentional," the plain and ordinary meaning of the word being obvious and there being no showing that the jury was confused by it.
4. The trial court's submission to the jury of the original indictment that charged that either the defendant or V had shot the victim, although erroneous, was harmless; the defendant was not prejudiced by that error

in light of the trial court's instruction to the jury that the substituted bill of particulars alleging V to have caused the death was binding on the state, that the defendant was not charged with intentional murder and that the indictment was not to be considered evidence.

5. The trial court did not err in denying the defendant's motion for acquittal; although the evidence against the defendant was in part circumstantial, the jury could nonetheless have found that the defendant was, beyond a reasonable doubt, guilty as charged.

Argued October 5—decision released December 6, 1988

Indictment charging the defendant with the crime of felony murder, brought to the Superior Court in the judicial district of Litchfield and tried to the jury before *Pickett, J.;* verdict and judgment of guilty, from which the defendant appealed to this court, which set aside the judgment and ordered a new trial; thereafter, the case was tried to the jury before *Moraghan, J.;* verdict and judgment of guilty, from which the defendant appealed to this court. *No error.*

William F. Gallagher, with whom was *Robert P. Borquez,* for the appellant (defendant).

Geoffrey E. Marion, deputy assistant state's attorney, with whom, on the brief, was *Dennis Santore,* state's attorney, for the appellee (state).

PETERS, C. J. The principal issue in this appeal is the admissibility of the defendant's written statement, which he claims was procured in violation of the rules of professional conduct, and was involuntary and unreliable. The present proceedings result from a retrial ordered by this court in *State* v. *Avis,* 198 Conn. 644, 504 A.2d 1364 (1986) (*Avis I*). The defendant, James Avis, had been found guilty of felony murder in violation of General Statutes § 53a-54c[1] after a joint trial

[1] "[General Statutes] Sec. 53a-54c. FELONY MURDER. A person is guilty of murder when, acting either alone or with one or more persons, he commits or attempts to commit robbery, burglary, kidnapping, sexual assault in the first degree, sexual assault in the first degree with a firearm, sexual

with a codefendant, Daniel Vinal, Jr. In *Avis I* we found reversible error in the trial court's failure to grant the defendants' motions for severance and ordered that Avis and Vinal be retried separately.[2] The state thereafter filed a substituted bill of particulars, again charging the defendant with felony murder in violation of § 53a-54c. After a trial to a jury, the defendant was found guilty as charged. He appeals from the judgment sentencing him to a term of imprisonment of not more than life and not less than ten years. We find no error.

The events surrounding the defendant's conviction are fully set forth in *Avis I*, supra, 647. As in that case, the present jury could reasonably have found the following facts. The victim, the defendant and Vinal were together in a Torrington bar early on the morning of October 8, 1978. The defendant knew that Vinal was armed. When the victim left the bar, the defendant and Vinal, in a car driven by the defendant, followed the victim's car as the victim drove toward Litchfield. After blinking his headlights to persuade the victim to pull over, the defendant parked his own car in the immediate vicinity, and he and Vinal accosted the victim in

assault in the third degree, sexual assault in the third degree with a firearm, escape in the first degree, or escape in the second degree and, in the course of and in furtherance of such crime or of flight therefrom, he, or another participant, if any, causes the death of a person other than one of the participants, except that in any prosecution under this section, in which the defendant was not the only participant in the underlying crime, it shall be an affirmative defense that the defendant: (A) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and (B) was not armed with a deadly weapon, or any dangerous instrument; and (C) had no reasonable ground to believe that any other participant was armed with such a weapon or instrument; and (D) had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury."

[2] Vinal was retried and found guilty of the crimes of murder in violation of General Statutes § 53a-54a and felony murder in violation of General Statutes § 53a-54c. Vinal appealed to this court, which found no error. *State v. Vinal*, 205 Conn. 507, 534 A.2d 613 (1987).

his car. Either the defendant or Vinal then attempted to take the victim's wallet; when he resisted, Vinal shot the victim and one of the two took his wallet, which was never recovered. After questioning by the police, the defendant fled the state. The victim died of his gunshot wound. Vinal was later arrested and charged with the murder of the victim.

An investigator hired by Vinal's attorney obtained from the defendant a written statement in which he confessed to shooting and robbing the victim, and exonerated Vinal. The investigator gave the statement to the police who obtained a warrant for the defendant's arrest. The defendant was arrested in Seattle, Washington, and returned to Connecticut for trial.

In the present proceedings, in which the defendant was charged with felony murder, the state conceded that it was Vinal who had shot the victim. What was at issue at trial was the defendant's role in the robbery. The defendant maintained that he had been unaware of Vinal's intent to rob the victim and had himself taken no part in the robbery. The state contended, to the contrary, that the defendant had participated in the robbery in the course of which Vinal killed the victim. After the jury found the defendant guilty, the trial court denied his motions for a new trial, to arrest judgment and for acquittal.

In his appeal from the trial court's judgment, the defendant has raised seven issues that can conveniently be addressed in four groupings. The defendant's principal claim of error is that the trial court erred in denying his motion to suppress his written statement. He also contends that the trial court made several erroneous evidentiary rulings, erred in its charge to the jury and in its submission of documents to them, and improperly denied his motion for acquittal.

I

The main issue on appeal is the defendant's claim that the trial court should have granted his motion to suppress his written statement. He claims that his statement was inadmissible for three reasons: unethical procurement, involuntariness and unreliability. We are not persuaded.

A

In the defendant's motions to suppress at trial,[3] he claimed that his written statement was inadmissible because it had been obtained through the allegedly unethical conduct of Joseph Gallicchio, Vinal's attorney. Under Disciplinary Rule 7-104 (A) (2) of the Code of Professional Responsibility, an attorney must avoid giving a person legal advice when there is a reasonable possibility of conflict of interest between that person and the attorney's client.[4] According to the defendant, a violation of this rule precludes the state from introducing the resulting document into evidence.

A necessary predicate to the defendant's argument is a factual finding of professional misconduct. The trial court, however, made the contrary finding. Even if we apply to this finding the scrupulous review that we undertake when constitutional rights are possibly implicated; see *State* v. *Weidenhof*, 205 Conn. 262, 267–68, 533 A.2d 545 (1987); the trial court's finding must stand.

[3] The defendant filed motion to suppress the statement dated May 6, 1986, and a motion to dismiss or in limine dated September 5, 1986. After a suppression hearing, the trial court denied both motions.

[4] Disciplinary Rule 7-104 (A) (2) of the Code of Professional Responsibility, in effect at the time in question, provided in relevant part: "During the course of his representation of a client a lawyer shall not . . . (2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client."

The relevant evidence, at trial, began with a showing that Robert DePretis, an investigator hired by Vinal's attorney, Gallicchio, located the defendant in New Hampshire. DePretis, Gallicchio, and Vinal then went to New Hampshire where Vinal, wearing a "wire," met the defendant to discuss the incident. The defendant was aware of the "wire" and refused to enter into a discussion. Eight days later, after another visit from DePretis and Gallicchio, and a private conference with the latter, the defendant agreed to discuss the incident, but only if Vinal were present. The following day the defendant spoke with Vinal alone and then wrote a confession in DePretis's presence. The confession stated, inter alia, that the defendant had robbed and shot the victim and that Vinal had been in the car unconscious during the incident.[5] When the defendant gave the statement to DePretis, he also instructed him not to release it until the following Monday. DePretis held the statement until Monday and then turned it over to the Connecticut state police, who obtained and executed a warrant for the defendant's arrest.

This record contains no definitive evidence that the defendant's written statement was the product of conduct by Gallicchio that violated DR 7-104 (A) (2). The

[5] The statement reads:

"To whom it may concern:

On or about October 8, 1978, in the early morning hours, I pulled a vehicle over on Old Route 8, East Litchfield, Connecticut. The vehicle was driven by the sole occupant known to me as 'Freddy.' I intended to rob him. He put up a struggle, and I fired at him twice. I left him unconscious, his car engine running. The wallet that was in his possession prior to my taking it was discarded by me at the bottom of Toll Gate Hill in a brook in Litchfield. The man riding in my vehicle was passed out and knew absolutely nothing about the incident mentioned above. My passenger was Danny Vinal. I found the gun in the front seat of the car I drove. I really don't know what make or model it was. I discarded the weapon somewhere during my travels since this incident occurred.

I'm confessing of this crime to rid myself of the overpowering guilt feelings. I gave this confession to Robert DePretis of Torrington, Connecticut.

Signed James J. Avis"

defendant testified that he relied upon Gallicchio because Gallicchio had formerly represented him in a matrimonial matter, that he had been influenced by Gallicchio's advice about his legal situation, and that Gallicchio promised him monetary benefits, from Vinal, for his statement. Gallicchio, however, testified otherwise. He denied having made representations about financial rewards for a statement. According to Gallicchio, the defendant was told that Gallicchio represented Vinal and was looking for information about what had happened on the night in question, which Vinal allegedly could not remember. Gallicchio stated that the defendant then indicated that he might have something to say, but would not say it unless Vinal were present.

On this record, it was not clearly erroneous for the trial court to have found Gallicchio the more credible witness and to have concluded that the state had proven that Gallicchio had not given the defendant legal advice. In the absence of a factual showing of a violation of DR 7-104 (A) (2), we need not reach the question of whether a private attorney's unethical behavior would require the court to exclude evidence obtained thereby from a criminal defendant not in police custody.

B

The defendant also contends that the court should have granted his motion to suppress his written statement because it was given involuntarily. In accordance with settled principles of due process, the state may not make use of an involuntary confession at trial; *Brown* v. *Allen*, 344 U.S. 443, 475, 73 S. Ct. 397, 97 L. Ed. 469 (1953); *State* v. *Smith*, 200 Conn. 465, 475, 512 A.2d 189 (1986); and bears the burden of proving voluntariness by a preponderance of the evidence. *Lego* v. *Twomey*, 404 U.S. 477, 489, 92 S. Ct. 619, 30 L. Ed. 2d 618 (1972); *State* v. *Smith*, supra, 477. The dispositive question in determining voluntariness is: " 'Is the

confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.'" *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 225–26, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). In order to resolve this question, a court must undertake a factual determination that considers the totality of the relevant circumstances. *State* v. *Smith*, supra, 477; *State* v. *Derrico*, 181 Conn. 151, 162, 434 A.2d 356, cert. denied, 449 U.S. 1064, 101 S. Ct. 789, 66 L. Ed. 2d 607 (1980).[6]

On the record before us, we conclude that the trial court was not clearly erroneous in finding the defendant's statement voluntary. The defendant contends that the statement was made involuntarily because it was made upon the advice of a person he considered to be his attorney and in return for a promise of financial gain from Vinal. As previously noted, both of these allegations were controverted at trial. Furthermore, the record demonstrates the defendant's exercise of independent control over the circumstances leading to his statement. For example, he repeatedly refused to cooperate in efforts to have a discussion of the incident until he could set preconditions for such a conference, and he successfully insisted on a delayed time schedule for public disclosure of his statement after he had

[6] The United States Supreme Court has stated that "[t]he most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause." *Colorado* v. *Connelly*, 479 U.S. 157, 166, 107 S. Ct. 515, 521, 93 L. Ed. 2d 473 (1986). That court has held that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." Id., 167. We reserve for another day the issue of whether statements made to a private individual may be found involuntary within the meaning of the due process clause contained in the Connecticut constitution.

written it. Finally, there is neither allegation nor evidence that the defendant was threatened, physically restrained or coerced into giving the statement. In light of the totality of the circumstances surrounding the defendant's statement, the trial court reasonably found that the defendant's will was not overborne nor was his capacity for self-determination critically impaired.

C

The defendant further contends that the trial court erred in denying his motion to suppress his written statement because it was substantially inaccurate, unreliable and untrustworthy. The basis for this claim is that the statement materially contradicted other evidence and was inconsistent with the state's theory of the incident. The trial court determined, however, that the statement was more probative than prejudicial.[7]

The trial court has wide discretion to determine the relevancy of evidence. *State* v. *Fritz*, 204 Conn. 156, 167, 527 A.2d 1157 (1987); *State* v. *Boucino*, 199 Conn. 207, 225, 506 A.2d 125 (1986); *State* v. *Sharpe*, 195 Conn. 651, 658–59, 491 A.2d 345 (1985); *State* v. *Piskorski*, 177 Conn. 677, 695, 419 A.2d 866, cert. denied, 444 U.S. 935, 100 S. Ct. 283, 62 L. Ed. 2d 194 (1979). The trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. *State* v. *Fritz*, supra, 167–68; *State* v. *Boucino*, supra; *State* v. *Falcon*, 196 Conn. 557, 566, 494 A.2d 1190 (1985).

[7] The trial court stated: "The reliability and trustworthy arguments, again, perhaps raise more smoke than substance. . . . [W]hile there was some inconsistency in the statement apparently bearing on the truth thereof, this is not to say that the entire statement or entire confession has to be excluded for that reason.

"The Court is satisfied that it does have substantial probative value, that that probative value does outweigh any prejudicial or inflammatory consideration it may have, and it does shed light actually on the fact that there really was a robbery."

The defendant contends that the state cannot use his written statement as evidence that a robbery occurred because the statement includes his confession that he shot the victim. According to the defendant, the unreliability of the statement is established by the state's own acknowledgement, in its prosecution of Vinal, that Vinal, and not the defendant, shot the victim. In the present proceedings, however, the state has not relied upon the statement in its entirety but only upon the portion that is evidence of the defendant's participation in a robbery. Such reliance is consistent with the conviction of Vinal for the robbery and murder of the victim.

Statements may be admitted into evidence although portions of those statements are known to be false. For example, statements intended by the defendant to be exculpatory may be admitted for an inculpatory purpose. *State* v. *Stepney,* 191 Conn. 233, 251, 464 A.2d 758 (1983), cert. denied, 465 U.S. 1084, 104 S. Ct. 1455, 79 L. Ed. 2d 772, reh. denied, 466 U.S. 954, 104 S. Ct. 2163, 80 L. Ed. 2d 547 (1984); *State* v. *DeMatteo,* 186 Conn. 696, 702–703, 443 A.2d 915 (1982) (misstatement admissible because it permits the inference that it was made to avoid detection). Just as the state need not vouch in its entirety for the credibility of the witnesses it calls; see, e.g., *State* v. *Williams,* 204 Conn. 523, 530–31, 529 A.2d 653 (1987); *State* v. *Graham,* 200 Conn. 9, 14–18, 509 A.2d 493 (1986); so the state is not required to adopt an all or nothing position with respect to the admission of written statements. The trial court's decision to admit the defendant's written statement into evidence was not an abuse of discretion in the circumstances of this case.

II

Apart from the admissibility of his inculpatory statement, the defendant raises three other evidentiary

issues. He maintains that the trial court erred in: (1) limiting his direct examination of the state's attorney and an assistant state's attorney concerning the reliability of his statement; (2) limiting his cross-examination of Robert DePretis by excluding evidence of prior allegedly inconsistent statements; and (3) limiting his cross-examination of DePretis by excluding evidence of alleged misconduct on his part. None of these evidentiary rulings was erroneous.

A

The defendant sought to examine the state's attorney and assistant state's attorney, during the hearing on the motion to suppress the defendant's written statement, in order to ascertain their opinions about the statement's reliability. The defendant claims that the trial court erred in sustaining the state's objection that these questions were irrelevant and immaterial.

The defendant maintains that the excluded questions were relevant with respect to the reliability of his confession because the state is under an ethical obligation not to offer tainted evidence. Whatever the contours of that obligation may be; see *State* v. *Jones*, 180 Conn. 443, 455, 429 A.2d 936 (1980), overruled in part, on other grounds, *State* v. *Powell*, 186 Conn. 547, 442 A.2d 939, cert. denied sub nom. *Moeller* v. *Connecticut*, 459 U.S. 838, 103 S. Ct. 85, 74 L. Ed. 2d 80 (1982); *State* v. *Moynahan*, 164 Conn. 560, 568, 325 A.2d 199, cert. denied, 414 U.S. 976, 94 S. Ct. 291, 38 L. Ed. 2d 219 (1973); we have already held that it does not encompass a duty to suppress a statement in its entirety simply because the state disavows it in part. See part IC, supra. In light of this holding, the trial court did not abuse its discretion in ruling that the proffered evidence was irrelevant and immaterial. *State* v. *Williams*, 203 Conn. 159, 183–84, 523 A.2d 1284 (1987); *State* v. *Fritz*, supra, 167–68.

B

The defendant sought to impeach the credibility of Robert DePretis by cross-examining him about allegedly inconsistent prior statements. The trial court ruled, on the state's urging, that DePretis's prior statements at the defendant's first trial were not materially inconsistent with his present testimony. The defendant assigns error to this ruling and to the trial court's consequent refusal to permit the questioning or to admit the earlier transcript into evidence.

The allegedly inconsistent statements in this case concern conversations that DePretis had with the defendant in New Hampshire when the defendant was persuaded to write his inculpatory statement. First, on cross-examination in the present trial, DePretis testified that he had gone to New Hampshire in order to find out what had happened on the night of the murder, because Vinal allegedly could not remember. In the *Avis I* trial, the witness had answered in the affirmative a question asking him whether he had hoped that the defendant would incriminate himself and exonerate Vinal. Second, during the present cross-examination, DePretis testified that he had never told the defendant that the victim's wallet was missing, whereas, in *Avis I*, his response to a similar question had been, "I believe I may have."[8] The trial court found no inconsistencies in either of these sets of statements.

[8] On cross-examination, DePretis testified:

"Q. You never told Mr. Avis that a wallet was missing?

"A. No.

"Q. You never did?

"A. No."

In the July 9, 1981 testimony that the defendant contends is inconsistent, DePretis testified:

"Q. Did you tell him that [the victim's] wallet was missing?

"A. I believe I may have.

"Q. Before he wrote the confession? . . .

"The Court: You have to answer the question, oh you're thinking.

"The Witness: Yes. Um, I can't recall."

Before examining the particulars of the defendant's claims of error, we must clarify the applicable standard of review. The defendant maintains that the trial court's limitation of the DePretis cross-examination violated the defendant's constitutional rights of confrontation and due process. In light of the defendant's wide-ranging cross-examination of DePretis, we are not persuaded that his claim has constitutional implications. The defendant sought to establish that DePretis had been inconsistent in describing the circumstances surrounding the execution of the defendant's written statement, but the alleged inconsistencies did not directly implicate any improper motive, interest, bias or prejudice on DePretis's part. In these circumstances, the scope of cross-examination raises an evidentiary and not a constitutional question, and is within the discretion of the trial court. *State* v. *Weidenhof,* supra, 270–71; *State* v. *Douglas,* 203 Conn. 445, 455, 525 A.2d 101 (1987).

As an evidentiary matter, evidence of a witness's prior inconsistent statement is admissible to attack the witness's credibility. *State* v. *Reed,* 174 Conn. 287, 302, 386 A.2d 243 (1978); *State* v. *Vega,* 163 Conn. 304, 307, 306 A.2d 855 (1972); *State* v. *Keating,* 151 Conn. 592, 597, 200 A.2d 724 (1964), cert. denied sub nom. *Joseph* v. *Connecticut,* 379 U.S. 963, 85 S. Ct. 654, 13 L. Ed. 2d 557 (1965). A statement is admissible as a prior inconsistent statement, however, only when the trial court is persuaded that, taking the testimony of the witness as a whole, the statements are in fact inconsistent. *State* v. *Piskorski,* supra, 710; *State* v. *Reed,* supra, 302–303; *State* v. *Chesney,* 166 Conn. 630, 636, 353 A.2d 783, cert. denied, 419 U.S. 1004, 95 S. Ct. 324, 42 L. Ed. 2d 280 (1974). Such a determination as to inconsistency lies within the discretionary authority of the trial court. *State* v. *Piskorski,* supra, 711; *State* v. *Reed,* supra, 303.

Applying these criteria in the present circumstances, we find no error. There is certainly no clear inconsistency with respect to DePretis's interest in discovering what had happened on the night of the murder and his hoping that he might learn something that would inculpate the defendant and exculpate his client, Vinal. The various statements about the victim's missing wallet present a closer question, but they too are not, in context, inconsistent. When DePretis, in *Avis I,* testified about possibly having told the defendant that the wallet was missing, he could not recall whether this conversation had occurred before or after the defendant wrote his confession. In the present proceedings, prior to the questioning at issue here, DePretis testified that he had discussed the missing wallet with the defendant *after* the defendant had told him of taking the wallet during the robbery.[9] Consequently, DePretis stated in both trials that he had discussed the wallet with the defendant. In the testimony at issue here, DePretis was not testifying that he had never discussed the wallet with the defendant, but rather that he did not *tell* the defendant that the victim's wallet was missing.[10] When DePretis's testimony is viewed in its entirety, it is not clear that his statements were inconsistent, and the trial court accordingly did not abuse its discretion in finding no inconsistency.

[9] DePretis testified: "Q. Was there any indication between you and Avis about the contents of that particular statement?

"A. In reference to the wallet, for corroborative purposes, to indicate where he had discarded it, so the police could retrieve it, and that would corroborate the facts in that statement.

"Q. So I'm clear on this, you told him you wanted to know where the wallet had been thrown?

"A. After he told me he had taken it during the robbery."

[10] In addition, we note that DePretis's statements regarding whether he told the defendant that the victim's wallet was missing are substantively irrelevant. Later testimony by the defendant provides support for a conclusion that the victim's wallet was taken and that, therefore, a robbery occurred. The defendant testified that after the incident, Vinal told him to stop the car because he had to throw something out. Vinal then got out of the car and threw a wallet into the river.

C

The defendant also sought to impeach the credibility of DePretis by cross-examining him about alleged prior misconduct. Because DePretis had been named in a grand jury report investigating alleged misconduct in the Torrington police department, the defense attempted to ascertain from DePretis whether he had ever received proceeds from the illegal sale of evidence held by the Torrington police while he was a member of that department. The trial court sustained the state's objection to this questioning. The defendant contends that the court should not have excluded this evidence because it was relevant to the veracity of DePretis.

A witness may be cross-examined regarding specific acts of misconduct only if they bear a specific significance upon the issue of the witness's veracity. *State* v. *Martin*, 201 Conn. 74, 86, 513 A.2d 116 (1986); *State* v. *Sharpe*, supra, 658; *State* v. *Dolphin*, 195 Conn. 444, 459, 488 A.2d 812, cert. denied, 474 U.S. 833, 106 S. Ct. 103, 88 L. Ed. 2d 84 (1985). " 'Whether to permit cross-examination as to particular acts of misconduct . . . lies largely within the discretion of the trial court.' " *State* v. *Martin*, supra, 86, quoting *State* v. *Vitale*, 197 Conn. 396, 401, 497 A.2d 956 (1985).

The trial court could reasonably have concluded that the proffered evidence was lacking in factual support and more likely to be prejudicial than probative. The court noted that the report of an investigatory grand jury is, at best, accusatory. The alleged misconduct, not being especially relevant to veracity, might have served to distract the jury's attention. Accordingly, the trial court's ruling was not an abuse of its discretion.

III

The defendant claims that the trial court erred in its instructions to the jury and in the documentation it sub-

mitted to the jury for its deliberations. We find no reversible error in either of these claims.

A

The defendant does not challenge the accuracy of the trial court's basic instructions to the jury. He takes issue, instead, with the trial court's refusal to give supplemental charges to the jury to define "passive acquiescence" and "intentional."

So long as jury instructions provide sufficient overall guidance for the jury; *State* v. *Rodgers,* 198 Conn. 53, 56, 502 A.2d 360 (1985); *State* v. *Mason,* 186 Conn. 574, 585, 442 A.2d 1335 (1982); *State* v. *Cooper,* 182 Conn. 207, 211, 438 A.2d 418 (1980); they need not contain standard dictionary definitions, because such definitions are "taken as a matter of common knowledge which the jury is supposed to possess." *State* v. *Asherman,* 193 Conn. 695, 737, 478 A.2d 227 (1984), cert. denied, 470 U.S. 1050, 105 S. Ct. 1749, 84 L. Ed. 2d 814 (1985). " 'In appeals not involving a constitutional question the court must determine whether it is reasonably probable that the jury were misled . . . .' " *State* v. *Corchado,* 188 Conn. 653, 660, 453 A.2d 427 (1982), quoting *State* v. *Williams,* 182 Conn. 262, 268, 438 A.2d 80 (1980).

The trial court read General Statutes § 53a-8[11] to the jury in its final instructions. As part of its explanation of liability under this statute, the court charged: "To find a person guilty under this section, you must find he was more than inactively present at the commission of the crime, or passively acquiesced in the crime, or

[11] "[General Statutes] Sec. 53a-8. CRIMINAL LIABILITY FOR ACTS OF ANOTHER. A person, acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender."

innocently did acts which in fact did aid in the commission of the crime." On seven occasions, the jury requested that the court reread that portion of the charge. During one of these supplemental rereadings, one of the jurors requested that the court define "passively acquiesced." The court refused. The court also refused the defendant's request that the court define "passive acquiescence." The defendant claims that the trial court should have responded affirmatively to these requests.

"Passive acquiescence" is not statutorily defined and has no legal meaning beyond the words' ordinary usage. Consequently, the court would ordinarily not be called upon to define the term. *State* v. *MacFarlane,* 188 Conn. 542, 550–52, 450 A.2d 374 (1982). The jury's multiple requests to hear the portion of the charge dealing with "passive acquiescence," however, support the defendant's claim that the court's refusal to define "passive acquiescence" in response to these requests might have deprived the jury of sufficient guidance in its deliberation. *State* v. *Fletcher,* 207 Conn. 191, 193–94, 540 A.2d 370 (1988). Consequently, we agree with the defendant that the trial court erred in refusing to define "passive acquiescence."

The trial court's error was, however, harmless. The record indicates that the jury was ultimately satisfied with the court's responses to its inquiries. Furthermore, read as a whole, the charge adequately instructed the jury that the defendant could not be convicted pursuant to § 53a-8 without intending to aid, and aiding, in the commission of the crime.[12] It is not probable that the jury was misled to believe otherwise.

[12] The court charged as follows: "To find a person guilty under this section, you must find he had a criminality of intent and unlawful purpose in common with the person or persons who actually committed the crime. . . .

"If you find that a person committed the felony murder in question, then the next thing you must decide is whether the Defendant shared the intent

The defendant also contends that the trial court erred in refusing to grant his request to define the word "intentional" as used in General Statutes § 53a-8. As the Appellate Court has stated: "The plain and ordinary meaning of the word 'intentionally' is so obvious that it is not error for the trial court to refuse to instruct the jury on its statutory definition." *State* v. *Lopez*, 5 Conn. App. 599, 605, 502 A.2d 418 (1985), cert. denied, 199 Conn. 803, 506 A.2d 146 (1986). In addition, the trial court, on four occasions, read to the jury the definition of intentional conduct contained in General Statutes § 53a-3 (11). The jury did not request that "intentional" be defined and there is no showing that it was confused by the court's refusal to grant the defendant's request to define that term. The court's refusal of the defendant's request was therefore not erroneous.

B

The defendant also claims that the jury's deliberations were impaired because the trial court, over his objection, erroneously submitted his original indictment to the jury. The indictment that underlay the proceedings in *Avis I* charged that either the defendant or Vinal had shot the victim. The substituted bill of particulars filed by the state before the defendant's retrial charged instead that "in the course of and in furtherance of the said robbery or flight therefrom, the co-participant, Daniel Vinal, caused the death of the victim . . . ." A subsequent substituted bill of particulars specifically alleged that Vinal had caused the death of the victim.

The trial court submitted the original indictment to the jury on the ground that the jury had been adequately instructed about the charge on which the defendant was being prosecuted. As the state virtually

of the person who committed the crime and, again, let me remind you that the intent which I speak of is the intent to steal, not to kill."

concedes, the trial court erred. "The trial court should submit no issue to the jury which is foreign to the facts in evidence, or upon which no evidence was offered, and it should not submit to the jury considerations which find no support in the evidence." *State* v. *Rodgers,* supra, 56; see also *State* v. *Cofone,* 164 Conn. 162, 168, 319 A.2d 381 (1972).

We are, however, persuaded that the trial court's error was harmless. The court had correctly instructed the jury that the substituted bill of particulars stating that Vinal caused the victim's death was binding on the state and that the defendant was not charged with intentional murder.[13] The court had also correctly instructed the jury that the indictment was not to be considered evidence. On this state of the record, the defendant was not prejudiced by the court's error and suffered no substantial injustice because of it. *State* v. *Smith,* 198 Conn. 147, 153, 502 A.2d 874 (1985).

IV

The final issue is whether the trial court erred in denying the defendant's motion for acquittal. The defendant contends that the evidence against him was insufficient to support the jury's guilty verdict. He challenges in particular the sufficiency of the evidence to establish that he participated in the alleged robbery. We are not persuaded.

When a verdict is challenged because of insufficient evidence, the issue is whether " ' "the jury could have reasonably concluded, upon the facts established and

[13] The court instructed the jury as follows: "As I told you, you can't consider the indictment as evidence of anything . . . .

• • •

"The State is not alleging that the Defendant intended to cause the death of the victim. That would constitute an intentional act of murder. In fact, the bill of particulars alleges Mr. Vinal shot [the victim] and not Mr. Avis."

the inferences reasonably drawn therefrom, that the cumulative effect of the evidence established guilt beyond a reasonable doubt." ' " *State* v. *Braxton*, 196 Conn. 685, 691, 495 A.2d 273 (1985), quoting *State* v. *Stepney*, 191 Conn. 233, 255, 464 A.2d 758 (1983), cert. denied, 465 U.S. 1084, 104 S. Ct. 1455, 79 L. Ed. 2d 772, reh. denied, 466 U.S. 954, 104 S. Ct. 2163, 80 L. Ed. 2d 547 (1984). Appellate analysis of a claim of insufficiency of the evidence requires us to undertake a twofold task: We must first review the evidence construing it in the light most favorable to sustaining the trial court's verdict. *State* v. *Williams*, 205 Conn. 456, 468, 534 A.2d 230 (1987); *State* v. *Vincent*, 194 Conn. 198, 206, 479 A.2d 237 (1984); *State* v. *D'Antuono*, 186 Conn. 414, 421, 441 A.2d 846 (1982); *State* v. *Perez*, 182 Conn. 603, 606, 438 A.2d 1149 (1981). " ' "We then determine whether, upon the facts thus established and the inferences reasonably drawn therefrom, the jury could reasonably have concluded that the cumulative effect of the evidence established guilt beyond a reasonable doubt . . . . In this process of review, it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct." ' " *State* v. *Plourde*, 208 Conn. 455, 458, 545 A.2d 1071 (1988), quoting *State* v. *Rollinson*, 203 Conn. 641, 665–66, 526 A.2d 1283 (1987), and cases cited therein.

There was sufficient evidence at trial to support the jury's finding in this case. In addition to the defendant's confession, the state proved that the defendant, in the company of Vinal, whom he knew to be armed, followed the victim's car and persuaded the victim to stop by the side of the road. The jury could reasonably have disbelieved the defendant's story that he thereafter remained in his own car and fell asleep or passed out. The defendant's testimony that he saw Vinal throw a wallet into the river after the incident, his subsequent

misstatements to the police, and his flight from Connecticut, using a number of aliases, supported the inference that he was conscious of his guilt. Although the evidence against the defendant was in part circumstantial, the jury could nonetheless have found that the defendant was, beyond a reasonable doubt, guilty as charged. The trial court therefore did not err in denying the defendant's motion for acquittal.

There is no error.

In this opinion the other justices concurred.

SUPREME COURT

STATE OF CONNECTICUT

S.C. NO. 13156	:	SUPERIOR COURT
STATE OF CONNECTICUT	:	J.D. OF LITCHFIELD
VS.	:	AT LITCHFIELD
JAMES AVIS	:	DECEMBER 15, 1988

MOTION FOR REARGUMENT

Pursuant to Section 4122 of the Practice Book, the defendant-appellant James Avis moves for reargument of the decision of the court published December 6, 1988 in the Connecticut Law Journal, 209 Conn. 290. The grounds for moving for reargument are as follows:

1. **The court failed to apply the proper standard of review in its consideration of the defendant's claim that the trial court's refusal to define the term "passive acquiescence" in its supplemental charge constituted harmful error.**

The court concluded that the trial court erred in in its refusal to define "passive acquiescence" as requested by a juror and defense counsel, after the jury had requested that the court read back the portion of the charge dealing with said term several times.

However, the court went on to state that the error was not prejudicial (209 Conn. at 306):

> The record indicates that the jury was ultimately satisfied with the court's responses to its inquiries. Furthermore, read as whole, the charge adequately instructed the jury that the defendant could not be convicted pursuant to Section 53a-8 without

intending to aid, and aiding, in the commission of the crime. It is *not probable* that the jury was mislead to believe otherwise. (emphasis added; footnote omitted).

"A fundamental element of due process is the right of a defendant charged with a crime to establish a defense." *State v. Miller,* 186 Conn. 654, 660, 443 A. 2d 906 (1982). This fundamental constitutional right requires proper jury instruction on the elements of the defense raised. *Id.*

The test to be applied where claimed error in a jury charge raises a constitutional question is whether it is reasonably possible that the jury was mislead. *State v. Marra,* 195 Conn. 421, 489 A. 2d 350 (1985); *State v. Tatem,* 194 Conn. 594, 483 A. 2d 1087 (1984). The harmlessness of a constitutional error in a charge to the jury must be established by the state beyond a reasonable doubt. *State v. Nardini,* 187 Conn. 513, 447 A. 2d 396 (1982); *State v. Cosgrove,* 186 Conn. 476, 442 A. 2d 1320 (1982).

The defendant respectfully submits that the court applied the wrong standard of review in its analysis of his claim that the trial court erred in its refusal to define the term "passive acquiescence." This court concluded that it was not probable that the jury was mislead.

Avis asserted in his defense that when Vinal killed Schmid, Avis was unconscious and had no prior knowledge as to what Vinal intended to do. The jurors deliberated for four days, during which they sent out numerous questions and the court gave supplemental charges. The jury was obviously giving serious consideration to the defense raised inasmuch as the jurors requested that the court read back the charge on assessory liability, and specifically the portion of the charge dealing with the term "passive acquiescence", on several occasions.

The concept of passive acquiescence went to the heart of the defense. At least one juror had difficulty in comprehending the concept. It is reasonably possible that the trial court's failure to define the term precluded the jury from properly considering the defense, and led the jury to arrive at the guilty verdict. The error very clearly was not harmless beyond a reasonable doubt.

Since the state failed to demonstrate that the trial court's refusal to define the term "passive acquiescence" was not harmless beyond a reasonable doubt, the trial court's error in refusing to define said term must be construed as harmful.

2. **The court mistakenly concluded that the trial court's submission of the original indictment to the jury constituted harmless error.**

The court concluded that the trial court erred in its decision to submit the original indictment — which alleged that either Avis or Vinal killed Schmid — to the jury. However, the court went on to determine that, because as the trial court charged the jury that the indictment was not to be considered evidence and that the substitute bill of particulars — which stated that Vinal had killed Schmid — was "binding" on the state, the error was harmless and the defendant suffered no substantial injustice.

The defendant's constitutional right to a fair trial was implicated in the trial court's decision to submit the original indictment to the jury, and as such, the state bears the burden of demonstrating that it was not reasonably possible that the defendant was prejudiced by the action. *Williams v. Salamone*, 192 Conn. 116, 119, 470 A. 2d 694 (1984). However, the defendant has the initial burden of establishing that the error is of constitutional dimension. *Id.*

The defendant's constitutional right to a fair trial was clearly at stake when the trial court submitted the original indictment to the jury. Had there been a complete absence of

any evidence supporting the allegation set forth in the indictment that Avis killed Schmid, it may be clear that the trial court's error was harmless.

However, the jury had before it the "confession" in which Avis stated that he had robbed and killed Schmid, and that Vinal had nothing to do with such actions. The jury also had the court's charge that the weight to be given to the evidence was solely within its province.

The error was clearly harmful in that the most prejudicial piece of evidence against the defendant was the "confession" in which the defendant stated he alone shot Schmid. The state abandoned this claim in its substitute bill of particulars. However, by submitting the indictment along with the evidence supporting a material allegation contained therein (that Avis shot Schmid), both pertaining to a claim no longer in issue (who shot Schmid), the trial court mislead and confused the jury, effectively presented the jurors with an alternative theory of criminal liability, and in so doing, denied the defendant his right to a fair trial.

The state has failed to demonstrate beyond a reasonable doubt that said error was harmless. Furthermore, when the verdict was announced and the defendant inquired whether the finding of guilty which was returned against him was as a principal or as an accessory, the state objected to such inquiry being put to the jury, and the court sustained the objection. (T. 10/8–14/86, p. 92; Appendix to defendant's brief, p. 299a) The defendant took timely exception to the court's denial of his request.

Assuming *arguendo* that the defendant had the burden of demonstrating the harmfulness of the trial court's decision, the trial court's denial of his inquiry to the jury precluded him from establishing the harmfulness of the error.

I. HISTORY OF CASE.

Prosecution for felony murder brought to the Superior Court for the Judicial District of Litchfield at Litchfield, tried to the jury before Pickett, J., resulting in a verdict and judgment of guilty, from which the defendant appealed. Said judgment was set aside and the case remanded for new trial by this court in *State v. Avis,* 198 Conn. 644, 504 A. 2d 1364 (1986). Thereafter the case was tried to the jury before Moraghan, J., resulting in a verdict and judgment of guilty. Appeal was taken in due course. Decision of the Supreme Court was published on December 6, 1988, 209 Conn. 290.

II. SPECIFIC FACTS ON WHICH THE MOVING PARTY RELIES.

The specific facts upon which this motion for reargument is based are set out in the motion.

III. LEGAL GROUNDS RELIED UPON.

This motion is filed pursuant to Section 4122 of the Practice Book, and is timely filed under Section 4010. The legal basis for granting reargument appears in the motion.

RESPECTFULLY SUBMITTED

THE DEFENDANT-APPELLANT,
James Avis

BY: /s/ William F. Gallagher
WILLIAM F. GALLAGHER
Gallagher & Gallagher
His Attorney.

CERTIFICATION OF SERVICE

THIS IS TO CERTIFY that a copy of the foregoing motion for reargument has been mailed, postage prepaid to: the Office of the Chief State's Attorney, Appellate Bureau, 340 Quinnipiac Street, P.O. Box 5000, Wallingford, Connecticut 06492, and the Office of the State's Attorney, Judicial District of Litchfield, P.O. Box 325, Litchfield, Connecticut 06759, on this 15th day of December, 1988.

/s/ William F. Gallagher
WILLIAM F. GALLAGHER

STATE OF CONNECTICUT
SUPREME COURT

NO. 13156

STATE OF CONNECTICUT

V.

JAMES AVIS : DECEMBER 20, 1988

ORDER

THE MOTION OF THE DEFENDANT, FOR REARGUMENT FILED DECEMBER 15, 1988, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY
O R D E R E D DENIED.

BY THE COURT,

/s/ Francis J. Drumm, Jr.
CHIEF CLERK

NOTICE SENT: 12-21-88
Gallagher & Gallagher
Geoffrey Marion, D.A.S.A.
Hon. Howard Moraghan
Clerk, Litchfield J.D.
(18-34549)
Reporter of Judicial Decisions

IN THE SUPERIOR COURT OF THE STATE OF CONNECTICUT, JUDICIAL DISTRICT OF LITCHFIELD, JULY TERM, 1980.

FIRST COUNT

The Grand Jury of the Judicial District of Litchfield by this indictment accuses James Avis a/k/a James Connely, of Torrington, Connecticut, of the crime of Felony Murder and charges that at the Town of Litchfield, October 8, 1978, the said James Avis a/k/a James Connely did attempt to commit or did commit Robbery and in the course of and in furtherance of the crime of Robbery or attempted Robbery, he, or another participant, did cause the death of a person other than one of the participants, Alfred Schmid, in violation of Section 53a-54c, General Statutes of Connecticut.

Dated at Litchfield, Connecticut, this 11th day of August, A.D. 1980.

August 11, 1980

For a true bill.

/s/ Bruce E. Schmitt
Foreman

IN THE SUPERIOR COURT OF THE STATE OF CONNECTICUT, Litchfield County,

Dennis A. Santore, State's Attorney for the Judicial District of Litchfield accuses James Avis of FELONY MURDER, in violation of Connecticut General Statutes Section 53a-54C and charges that at the Town or City of Litchfield, and State of Connecticut on or about the 8th day of October 1978, the said James Avis when acting with another person, namely Daniel Vinal, committed robbery and in the course of and in furtherance of such crime or of flight therefrom the other participant, Daniel Vinal, caused the death of a person other than one of the participants.

/s/ Dennis A. Santore
DENNIS A. SANTORE
State's Attorney

October 7, 1986

NO. CR. 18-345349 | SUPERIOR COURT

STATE OF CONNECTICUT | JUDICIAL DISTRICT OF LITCHFIELD

VS. | AT LITCHFIELD

JAMES AVIS | SEPTEMBER 29, 1986

SUBSTITUTED BILL OF PARTICULARS

The State of Connecticut, acting through Dennis Santore, State's Attorney for the Judicial District of Litchfield, alleges and charges that on October 8, 1978, in the Town of Litchfield, the defendant, JAMES AVIS, did commit the crime of FELONY MURDER in violation of Connecticut General Statutes Section 53a-54c;

That during the evening hours of October 7, 1978 and the early morning hours of October 8, 1978, the defendant, JAMES AVIS and another person, namely DANIEL VINAL, frequented, in the company of one another, business establishments in the Town of Burlington, CT, namely the Burlington Inn, and in the Town of Torrington, CT, namely the Regency Lounge;

That the defendant, JAMES AVIS, did know that the co-participant, DANIEL VINAL, was armed with a handgun;

That the defendant, JAMES AVIS and the co-participant, DANIEL VINAL, were at the Regency Lounge during the early morning hours of October 8, 1978, in the presence of the victim, ALFRED SCHMID, and left said establishment at approximately the same time as the victim;

That approximately between the hours of 4:00 A.M. and 5:40 A.M., on October 8, 1978, the defendant JAMES AVIS and the co-participant, DANIEL VINAL, while in the company of one another, came upon the victim, ALFRED

SCHMID, on a public highway known as Route 800, in the Town of Litchfield, CT, and robbed ALFRED SCHMID of his wallet, known to be in his possession that evening; and

That in the course of and in furtherance of said robbery or flight therefrom, the co-participant, DANIEL VINAL, caused the death of the victim, ALFRED SCHMID, by shooting him with a handgun.

THE STATE OF CONNECTICUT

BY /s/ Dennis A. Santore
DENNIS A. SANTORE
State's Attorney

CERTIFICATION

This is to certify that a copy of the foregoing was hand-delivered to counsel of record on September 29, 1986.

/s/ Dennis A. Santore
DENNIS A. SANTORE
State's Attorney

Filed on September 30, 1986

STATE OF CONNECTICUT

NO. 18-34549JD	:	SUPERIOR COURT
STATE OF CONNECTICUT	:	JUDICIAL DISTRICT OF LITCHFIELD
VS	:	AT LITCHFIELD
JAMES AVIS	:	DECEMBER 5, 1986

Present, Hon. Howard J. Moraghan, Judge

J U D G M E N T

Upon indictment laid before the Grand Jurors of the Judicial District of Litchfield, duly summoned, impaneled and sworn, on August 11, 1980, charging said James Avis with the crime of Felony Murder in the words and figures following:

IN THE SUPERIOR COURT OF THE STATE OF CONNECTICUT, JUDICIAL DISTRICT OF LITCHFIELD, JULY TERM 1980.

FIRST COUNT

The Grand Jury of the Judicial District of Litchfield by this indictment accuses James Avis a/k/a James Connely, of Torrington, Connecticut, of the crime of Felony Murder and charges that at the Town of Litchfield, October 8, 1978, the said James Avis a/k/a James Connely did attempt to commit or did commit Robbery and in the course of and in furtherance of the crime of Robbery or Attempted Robbery, he, or another participant, did cause the death of a person other than one of the participants, Alfred Schmid, in violation of Section 53a-54c, General Statutes of Connecticut.

Dated at Litchfield, Connecticut, this 11th day of August, A.D. 1980.

ATTEST:

/s/ Bruce E. Schmitt
Foreman

as by indictment on file will appear.

The said defendant appeared, and being of the age of forty-seven years, then for plea said "Not Guilty" to said indictment on October 29, 1980 and elected to be tried by a jury of twelve.

Thence said cause came to this Court on the twenty-ninth day of July, 1981 when the defendant having again appeared and after a full hearing, the case was committed to the jury; who, on the thirtieth day of July, 1981, at 11:04 A.M. returned a verdict of guilty as charged in said indictment, which verdict was accepted and ordered recorded by the Court.

Thence to August 25, 1981 when the parties having appeared and argued Motion For Acquittal Upon Verdict of Guilty, Motion For Judgment of Acquittal, Motion For New Trial, Motion in Arrest of Judgment, the Court denied said motions.

A written report of investigation as to the defendant by the Probation Department was presented to and considered by the Court before sentence, on September 25, 1981.

Whereupon it is adjudged that the said defendant James Avis be placed in the custody of the Commissioner of Corrections for the term of not less than 12 years nor more than life.

BY THE COURT (Pickett, J)

Appeal Bond set at $150,000.00 with the condition that if there is any intoxication rearrest will be ordered.

Thence to October 14, 1981 an Appeal having been filed and an Appeal Bond having been posted.

Thence to February 18, 1986 after a full hearing to the Supreme Court there was a finding of error, the judgment was set aside and the case was remanded for a new trial.

Thence to October 7, 1986 upon information of Dennis A. Santore, State's Attorney, within and for said Judicial District, charging said James Avis with the crime of:

Felony Murder, 53a-54c

as by information on file will appear.

Thence to October 14, 1986 when the parties having again appeared and after a full hearing, the case was committed to the jury, who, at 11:27 A.M. returned a verdict of guilty as charged in said information, which verdict was accepted and ordered recorded by the Court.

Thence to December 5, 1986 when the parties having appeared and argued Motion For Acquittal, Motion in Arrest of Judgment and Motion For New Trial, the Court denied said motions.

A written report of investigation as to the defendant by the Probation Department was presented to and considered by the Court before sentence.

Whereupon it is adjudged that the said defendant James Avis be placed in the custody of the Commissioner of Corrections for the term of not more than life nor less than 10 years.

BY THE COURT (Moraghan, J)
/s/ David C. Bristol
David C. Bristol, Chief Clerk

Appeal Bond set at $200,000.00

APPEAL

STATE OF CONNECTICUT v. JAMES AVIS

In the above entitled action the Defendant James Avis hereby appeals to the Supreme Court from the judgment. (C.G.S. Section 51-199(a)(b).

/s/ William F. Gallagher

March 17, 1987

Portion of Transcript re: Decision by Trial Court to Submit Original Indictment to the Jury

* * *

(Alternates excused from the courtroom.)

THE COURT: Would you check the exhibits, gentlemen.

MR. SANTORE: Yes.

MR. RICCIO: I had one question. I did not understand the original indictment was going to the Jury, since it had been superseded by the amended information.

THE COURT: Ordinarily, it doesn't when there is new information which is drawn up.

MR. RICCIO: My concern is — and I think it's a bipartisan one — the accusations, I would not want to have them confused in there. There are accusations markedly different than the final information in the bill of particulars, and I don't really think it serves any purpose to bring them in. It may serve some confusion as to exactly what was going on.

MR. SANTORE: I think the Court was pretty specific in its remarks.

THE COURT: I was.

MR. RICCIO: I may not have listened when I heard earlier, but I have a concern for putting in charging documents which has an alternative way for robbery and, when in fact it was superseded by another pleading, and I don't mean this in the sense of an advocacy. I think it has been superseded when it would serve no useful purpose for the Jury's deliberations. I don't know what having that document would advance the Jury's deliberations.

THE COURT: I think they have been adequately instructed, Mr. Riccio.

MR. RICCIO: May I take an exception?

THE COURT: Sure.

MR. RICCIO: For the record, I want to note my objection to that going in, a transcript which was read, although I know it was marked as a full exhibit, and I know Your Honor is going to allow it to be admitted.

THE COURT: All of it was not read.

MR. SANTORE: Yes, it was.

THE COURT: All right.

(Exhibits checked over by counsel.)

THE COURT: Will you deliver those, Sheriff, to the Jury and tell them that they can begin their deliberations?

(The Sheriff delivered the exhibits and information into the Jury deliberation room.)

THE COURT: The Court will stand in recess until the Jury reaches a verdict.

(Recess at 4:12 p.m.)

(Recess was over at 4:57 p.m.)

THE COURT: Would you call the State's Attorney for me, Mr. Sheriff.

(At this time there was a short delay for the arrival of counsel.)

THE COURT: Gentlemen, I think the Jury has been at it long enough this afternoon. We will bring them back tomorrow at 10.

(The Jury was summoned but into the courtroom.)

* * *

Portion of Transcript re: Supplemental Charge on Accessory Liability Statute; Request for Definition of the Term "Passive Acquiescence"

* * *

(Case called back up at 3:23 p.m.)

THE COURT: Back to State versus Avis, Court's Exhibit 7 says "We would like to hear the five points that you mentioned before."

Court's Exhibit 8, "Could we also hear the testimony given by Duke Wall when they were in the bar, during and after they left the bar."

That we will have to dig out from the stenographic records.

Mr. Hopkins, will you try to find that for me, please.

Recess.

(Recess at 3:25 p.m.)

(Recess was over at 3:56 p.m.)

THE COURT: Call in the Jury, please.

(Jury summoned out into the courtroom immediately.)

THE COURT: Will counsel stipulate and agree that the entire Jury is present and seated in the jury box?

MR. SANTORE: Yes.

MR. RICCIO: Yes.

THE COURT: There are two questions from you, the first one, Court's Exhibit 7:

"We would like to hear the five points you read before."

Court's Exhibit 8, "Could we also hear the testimony of Duke Wall when they were in the bar, both during and after they left the bar."

Which do you want to hear first?

THE JURY: The testimony of Duke Wall.

(The testimony of Duke Wall, just requested by the Jury, was read by the Court Reporter, James Hopkins, at 3:58 p.m.)

THE COURT: Do you still want the accessory instructions?

THE JURY: Yes.

THE COURT: There is a statute called our accessory statute. It reads this way:

"A person acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in the conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender.

You will note that this section of the statute does not connect the five things specified by the word "and" but separates them by the word "or."

The State does not have to prove that the person did all five of the things specified. It is sufficient that the State proves any of the five things specified. If the State proves beyond a reasonable doubt that the Defendant solicited, requested, commanded, importuned or intentionally aided another person in the commission of the robbery, the felony, then he is guilty of felony murder.

Under this section — under this statute, excuse me, if the Defendant did any of the five things specified, he is, in the eyes of the law, just as guilty of the crime of felony murder as though he had directly and personally committed the crime.

At this point, I will briefly define the five terms used in this section.

"Solicit" means to ask earnestly.

"Request" means to ask for or express a desire for.

"Command" means to order or direct.

"Importune" means to command, urge or incite.

"Aid" means to assist, help or support.

The law makes all of the following persons guilty of a crime, those who actually committed the crime, those who do some act which forms a part of the crime, those who assist in the actual commission of the crime, those who assist in the commission of any Act which forms a part of the crime, those who directly or indirectly instigate or encourage or order any other persons to do an act which forms a part of the crime.

To find a person guilty under this section, you must find he was more than inactively present at the commission of the crime or passively acquiesced in the crime, or innocently did acts which in fact did aid in the commission of the crime.

A JUROR: Would you read that one section over again?

THE COURT: Sure.

THE JUROR: Back up nine sentences.

THE COURT: To find a person guilty?

THE JUROR: Yes.

THE COURT: To find a person guilty under this section, you must find he was more than inactively present at the commission of the crime or passively acquiesced in the crime, or innocently did acts which in fact did aid in the commission of the crime.

Do you want that again?

THE JUROR: Please.

THE COURT: To find a person guilty under this section, you must find he was more than inactively present at the commission of the crime or passively acquiescent in the crime, or innocently did acts which in fact did aid in the commission of the crime.

THE JUROR: Would you just read that once more, I'm sorry.

THE COURT: I will read it as long as you would like to hear it.

THE JUROR: Loudly.

THE COURT: That may be a problem.

To find a person guilty under this section, you must find he was more than inactively present at the commission of the crime or passively acquiescent in the crime, or innocently did acts which in fact did aid in the commission of the crime. (Pause)

Okay, once again. To find a person guilty under this section, you must find he was more than inactively present at the commission of the crime or passively acquiescent in the crime, or innocently did acts which in fact did aid in the commission of the crime.

THE JUROR: Okay, thank you.

A JUROR: Could you define "passively acquiesced"?

THE COURT: Did I? No. Can I? At this point, no.

THE JUROR: Is there another sentence?

THE COURT: Continuing on after that, to find a person guilty under this section, you must find he has a criminality of intent and unlawful purpose in common with the person or persons who actually committed the crime. Whether a person is present at the commission of the crime, aids or abets its commission is a question of fact, the answer to which depends on the circumstances surrounding his presence and his conduct both during the commission of the crime and after the commission of the crime.

If you find that a person committed the felony murder in question, then the next thing you must decide is whether the Defendant shared the intent of the person who committed the crime, and I remind you that the intent of which I speak is to steal.

If you do find the Defendant, in sharing the intent to steal, if any, did one of the five things specified, that is solicited, requested, commanded, importuned or intentionally aided in the commission of the crime, then he would be guilty of the crime.

To summarize then, you must find beyond a reasonable doubt the Defendant did any one of the five things specified in the statute. Then he is just as guilty of the crime of felony murder as though he had committed it, and you should return a verdict of guilty. If you do not find that the Defendant did any of the five things specified, then you should return a verdict of not guilty.

Does that satisfy you, ladies and gentlemen?

THE JURY: Yes.

(The Court concluded with its reading of the charge at 4:18 p.m. and the jury was excused from the courtroom.)

THE COURT: Anything else, gentlemen?

MR. SANTORE: No, Your Honor.

THE COURT: Mr. Riccio?

MR. RICCIO: I would reiterate my exception to submitting to this Jury —

THE COURT REPORTER: I can't hear you, Mr. Riccio?

MR. RICCIO: I would reiterate my exception to submitting to this Jury — take exception to the submitting — I would reiterate my earlier exception to reading the accessory section to them, as I mentioned before, and I would take exception to His Honor's failure to define the word "intentional," which is defined in our Penal code.

Third, I would be prepared, and I would like to work out a definition for the term "passive acquiescence." We could perhaps work out some definition with regard to that term. I know what Your Honor feels, but we take exception to your failure to at least attempt to define that. I would be certainly willing to do that. They have asked for this charge five times, obviously, there is a problem. I would be willing to try to work out a definition, which I would like the Court to instruct them on.

THE COURT: Anything else?

MR. RICCIO: That would be to define "passive acquiescence."

THE COURT: I told you, it is not what you would like to hear read or the State would like to have read, what you would like to change or the State would like to change.

The charge as delivered was repeated to the extent that the Jury cared to hear it, and any exceptions you took initially have been preserved, and you would take an exception at this point, and I will tell you, sir, as I told you during the trial, even in this climate, the criminal procedure, there are some rules, and they still bind both sides.

Your exceptions are noted.

MR. RICCIO: Thank you.

(Recess at 4:25 p.m.)

* * *

Portion of Transcript re: Verdict Returned; Request for Inquiry to the Jury as to the Basis for the Verdict

* * *

The Jury came in with a verdict at 11:25 a.m.)

THE COURT: Miss Clerk, would you approach the bench, please.

(The Assistant Clerk, Patricia Maher, came in front of the bench.)

THE COURT: Gentlemen, I have a note from the Jury indicating "We do have a verdict in the case of State versus Avis."

Anything before we return the Jury, gentlemen?

MR. SANTORE: Nothing, Your Honor.

MR. RICCIO: No, Your Honor.

THE COURT: Under no circumstances does the Court desire or does it intend to permit the identity of the Jurors to be broadcast, so, with that admonition, gentlemen, we will bring out the Jury.

(The Jurors were summoned out into the courtroom at exactly 11:27 a.m.)

THE COURT: You can be seated, gentlemen.

You can proceed, Mrs. Clerk.

(At this time the roll call was taken of the Jury.)

ASSISTANT CLERK MAHER: Have you agreed upon your verdict, ladies and gentlemen of the Jury?

THE JURY: Yes.

THE ASSISTANT CLERK: James Avis, rise and face the Jury.

Look upon the accused. What say you, is he guilty or not guilty of the crime of felony murder with which he is charged?

THE FOREMAN: Guilty.

ASSISTANT CLERK MAHER: You, ladies and gentlemen of the Jury and each of you say unanimously that the accused is guilty of the crime of felony murder, and so say you all?

THE JURY: Yes.

THE COURT: You can be seated, ladies and gentlemen. Thank you.

The verdict may be ordered accepted and recorded.

MR. RICCIO: May I ask at this time whether Mr. Avis was convicted as a principal or an aider, in regard to the crime of felony robbery?

MR. SANTORE: I would object.

THE COURT: Objection sustained. I would not ask that. There is no request in writing for it.

MR. RICCIO: I take exception.

THE COURT: Noted.

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